NO. 99243-6

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KATHY ARLENE TURNER, individually and as the Personal Representative of the ESTATE OF KENT ALLEN TURNER, Deceased,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, and LEWIS MASON THURSTON AREA AGENCY ON AGING,

Respondents,

and

RES-CARE WASHINGTON, INC., Delaware Corporation; and LIFE THERAPEUTIC WORKS, LLC, a Washington Limited Liability Corporation,

Defendants.

BRIEF OF NATIONAL COUNCIL ON INDEPENDENT LIVING AND ADVANCING STATES, ET AL., AS AMICI CURIAE

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REGULATIONS

I. RULE 10.3(e) STATEMENT

Lead amici responsible for the submission of this amicus brief are:

National Council on Independent Living: The National Council on Independent Living (NCIL) is the oldest cross-disability, national grassroots organization run by and for people with disabilities. NCIL's membership is comprised of centers for independent living, state independent living councils, people with disabilities and other disability rights organizations. NCIL's mission is to advance the independent living philosophy and to advocate for the human rights of, and services for, people with disabilities to further their full integration and participation in society.

ADvancing States: ADvancing States was founded in 1964 under the name National Association of State Units on Aging (NASUA). In 2019, the association changed its name to ADvancing States. Today, ADvancing States represents the nation's 56 state and territorial agencies on aging and disabilities and long-term services and supports directors whose mission is to design, improve, and sustain state systems delivering long-term services and supports for older adults, people with disabilities. ADvancing States supports visionary leadership, the advancement of systems innovation and the articulation of national policies that support long-term services and supports for older adults and people with disabilities.

In addition, the following other organizations and entities join in the submission (in alphabetical order):

The Alliance of People with disAbilities: The Alliance of People with disAbilities (Alliance), a Center for Independent Living, has a forty-three year history as a grassroots advocacy organization serving King County, Washington. Alliance provides consumer-controlled, cross-disability, non-residential services that cross age, race, ethnicity, socio-economic status, immigration status, sexual orientation, gender identification or any other category. Alliance's mission is to empower people with disabilities to live with autonomy and choice. Alliance is a leader in assisting disabled individuals to reach their goals and subject matter experts educating on the rights of people with disabilities to allow people with disabilities to enjoy full inclusion, autonomy and civil rights.

American Association of People with Disabilities: American Association of People with Disabilities (AAPD) works to increase the political and economic power of people with disabilities. A national cross-disability organization, AAPD advocates for full recognition of the rights of over 56 million Americans with disabilities.

Center for Independence: Center for Independence (CFI) is a non-residential community-based organization, also known as a Center for Independent Living. CFI has been around since 1981 and has been working

to promote the inclusion and wellness of all individuals with disabilities. More than 51% of our staff and board of directors are individuals with disabilities. CFI covers eight counties which include Whatcom, Skagit, Island, San Juan, Snohomish, South King, Pierce and Thurston. CFI provides consumer-controlled, cross-disability services and serves a diverse population. CFI's mission is to serve as a resource for individuals with disabilities to fully access and participate in the community through outreach, advocacy, and independent living skills development.

Central Washington Disability Resources: Central Washington Disability Resources (CWDR) is a non-residential Center for Independent Living. Since 1981 CWDR has been working to promote the inclusion and wellness of all individuals with disabilities. Our staff and board of directors includes individuals with disabilities. CWDR covers Yakima, Grant, Chelan, Douglas, and Kittitas County. CWDR provides consumer-controlled, cross-disability, non-residential services that cross age, race, ethnicity, socio-economic status, immigration status, sexual orientation, gender identification or any other category. CWDR's mission is to advance the empowerment, inclusion, and wellness of all persons with disabilities through advocacy, community education, peer mentoring, and skill development so that they may realize independence and full participation in all areas of life.

Disability Action Center – Northwest, Inc.: Disability Action Center—Northwest, Inc. (DAC) is a charitable organization established under Internal Revenue Code 501(c)(3) whose mission is to building community, achieving equality, and creating independence in an accessible world. Using our collective power we provide advocacy, education, and support to: foster attitudes, policies, and environments of equality and choice; create a supportive and resourceful community of people with disabilities; and encourage people with disabilities to take personal responsibility and fully participate in society. DAC operates in Washington state and Idaho providing the five (5) core services of information and referral, individual and systems advocacy, peer counseling, independent living skills training, and transition services related to institutional placements and youth according to federal requirements of the Rehabilitation Act of 1973 as amended.

Washington State Independent Living Council: The vision of the Washington State Independent Living Council (WASILC) is a world where people with disabilities exercise their equal rights and participate fully in all aspects of society. This encompasses the right to live in the community of their choice with the appropriate service they need to thrive and experience their community. Our mission is to promote a statewide network supporting the Independent Living Philosophy for people with disabilities through

advocacy, education, planning, and collaboration. We accomplish our mission through living and expressing our core values of: Choice, Self Sufficiency, Independence, Voice, Equal Opportunity, Self-Determination, Equal Access, Consumer Control, Self-Direction, Self-Advocacy, Respect, and Honesty. This is our mandate as prescribed in the Rehabilitation Act, Section VII.

Washington Autism Alliance & Advocacy. Washington Autism Alliance & Advocacy ("WAAA") is statewide nonprofit agency that provides advocacy to individuals with ASD and/or other intellectual and developmental disabilities ("I/DD") and their families on issues such as access to healthcare and education. WAAA has 2 a vital interest in ensuring that all individuals with ASD and/or I/DD have equal opportunities and are included in every aspect of society.

For decades, people with disabilities have fought to gain independence and freedom in their own lives. They have occupied governmental buildings, bus stations, private entities and protested outside of lawmakers' offices to gain equal access to community-based services. They desire what others in this country want—for example, freedom to achieve their personal goals on their terms. The Appellant in this case is asking this Court to disrespect the wish of Kent Turner to have this freedom under the paternalistic argument that the State of Washington should have

kept him in a nursing facility instead of providing him with funds to live in his own preferred home. This argument runs afoul of the law and the spirit of freedom that our country has. Mr. Turner made his desires perfectly clear to the Washington State Department of Social and Health Services that he wanted to live out in the community in his own home instead of the nursing facility in which he temporarily was residing. He exercised his civil rights protected under the federal laws to live in his own home. This Court should honor the current laws safeguarding his right to live in his own home as well as his expressed wish to do so.

Kent Turner was indisputably an individual with a severe disability. In fact, Appellant's case revolves around that fact. However, as a competent individual with a disability, he had conclusively established rights under federal law that protected him from unnecessary institutionalization. The State of Washington and its relevant agencies could not have refused to allow Mr. Turner to exercise those rights and to live in the community. Had they done so, they would have violated Title II of the Americans with Disabilities Act (the "ADA") and other applicable federal law. Mr. Turner passed away tragically. However, the overprotective fears of others for the safety of a person with a disability cannot outweigh the rights of that individual himself to assert his independence in a community setting, even

if that independence carries some risk. As explained below, Congress has spoken unequivocally on this point.

II. FEDERAL LAW PROHIBITS DISCRIMINATION AGAINST PEOPLE WITH DISABILITIES THROUGH UNNECESSARY INSTITUTIONALIZATION.[1]

Title II of the ADA, 42 U.S.C. § 12132, prohibits public entities from discriminating against qualified persons with disabilities in providing services. Similarly, Section 504 of the Rehabilitation Act of 1973 ("Section 504), 29 U.S.C. § 794(a), prohibits recipients of federal funds from discriminating against qualified persons with disabilities. Policies and practices that have the effect of unjustifiably segregating persons with disabilities in institutions constitute prohibited discrimination under these Acts. *See*, e.g., *Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, at 600-03 (1999).

Under both Title II of the ADA and Section 504, public entities are required to administer services in the most integrated setting appropriate to the needs of qualified individuals with disabilities. 28 C.F.R. § 35.130(d) (implementing Title II of the ADA); 28 C.F.R. § 41.51(d) (implementing Section 504). In *Olmstead*, 527 U.S. at 600-01, the Supreme Court

[1] With respect to the Statement of the Case and factual background, please see note 3 below.

concluded that the ADA and Section 504 mandate the integration of people with disabilities into community life.

The Court set out three elements that a plaintiff must establish to prove a discrimination claim based on unnecessary institutionalization: "[T]he proscription of discrimination may require placement of persons with … disabilities in community settings rather than in institutions … when [1] … treatment professionals have determined that community placement is appropriate, [2] the transfer from institutional care to a less restrictive setting is not opposed by the affected individual, and [3] the placement can be reasonably accommodated, taking into account the resources available to the State and the needs of others with … disabilities." *Olmstead*, 527 U.S. at 587.

The Court in *Olmstead* recognized "that unjustified institutional isolation of persons with disabilities is a form of discrimination" in its own right because (1) "institutional placement of persons who can handle and benefit from community settings perpetuates unwarranted assumptions that persons so isolated are incapable or unworthy of participating in community life" and (2) "confinement in an institution severely diminishes the everyday life activities of individuals, including family relations, social contacts, work options, economic independence, educational advancement, and cultural enrichment." *Olmstead*, 527 U.S. at 600-01.

In *Olmstead*, the state defendant argued that it had not discriminated against the two plaintiffs because "'discrimination necessarily requires uneven treatment of similarly situated individuals' and [the plaintiffs] had identified no comparison class, i.e., no similarly situated individuals given preferential treatment." *Id.*, at 598. However, the Court was "satisfied that Congress had a more comprehensive view of the concept of discrimination advanced in the ADA." *Id.* *See also*, e.g., *Radaszewski v. Maram*, 383 F.3d 599, 607-8 (7th Cir. 2004). In any event, as the Court recognized, "[d]issimilar treatment … exists in this key respect: In order to receive needed medical services, persons with … disabilities must, because of those disabilities, relinquish participation in community life they could enjoy given reasonable accommodations, while persons without … disabilities can receive the medical services they need without similar sacrifice." *Olmstead*, 527 U.S. at 601.

III. THE STATE MAY NOT ENGAGE IN DISCRIMINATION THROUGH UNNECESSARY INSTITUTIONALIZATION EVEN IF IT IS MOTIVATED BY OVERPROTECTIVE ATTITUDES TOWARDS PEOPLE WITH DISABILITIES.

Institutionalization based on overprotective attitudes is not insulated from liability under the ADA as interpreted by *Olmstead*. In the preamble to the ADA, 42 U.S.C. § 12101(a)(5), Congress itself decried the fact that "individuals with disabilities continually encounter various forms of

discrimination, including … overprotective rules and policies…." *See also*, e.g., *Dudley v. Hannaford Bros. Co.*, 333 F.3d 299, 310 (1st Cir. 2003) ("Congress, in enacting the ADA, explicitly warned that 'overprotective rules and policies' erect discriminatory barriers to people with disabilities.") Federal law thus permits individuals with disabilities to take their own risks, just as individuals without disabilities do. Thus, for example, when the United States District Court for the District of Arizona considered the case of an individual with a disability coaching Little League Baseball from a wheelchair on the field, it enjoined Little League Baseball from refusing to permit him to coach in this manner because he posed no direct threat to the health and safety of others. *Anderson v. Little League Baseball, Inc.*, 794 F. Supp. 342, 345 (D. Ariz. 1992). It gave no consideration to the question of whether the individual's own health and safety might be at increased risk in such a position. He had just as much right to risk foul balls, wild pitches, flying bats, and running children as his peers without disabilities.

Other federal courts have similarly warned against discrimination through overprotection. *See*, e.g., *Belancio v. Kan. Dep't of Health & Env't*, No. 17-cv-1180-EFM, 2018 U.S. Dist. LEXIS 161679, *30-31 (D. Kansas Sept. 21, 2018) ("Defendant must be careful not to let a policy meant to protect Plaintiff's best interests result in an overprotection that works against Plaintiff's best interests and has the unintended consequence of

discriminating on the basis of disability."); *Celano v. Marriott Int'l, Inc.*, No. C 05-4004 PJH, 2008 U.S. Dist. LEXIS 6172, *48-49 (N.D. Cal. Jan. 28, 2008) (declining to interpret Title III of the ADA, "which expressly defines a 'direct threat' as 'a significant risk to the health and safety of others,' 42 U.S.C. § 12182(b)(3), to apply where the threat is only to the covered individual himself or herself.")

In fact, the affirmative obligations of the State and its agencies to provide reasonable accommodations to avoid unnecessary institutionalization pursuant to *Olmstead* remain in force regardless of the motivations or attitudes of those entities. *See*, e.g., *Bennett-Nelson v. Louisiana Bd. of Regents*, 431 F.3d 448, 454-455 (5th Cir. 2005) ("In addition to their respective prohibitions of disability-based discrimination, both the ADA and the Rehabilitation Act impose upon public entities an affirmative obligation to make reasonable accommodations for disabled individuals. Where a defendant fails to meet this affirmative obligation, the cause of that failure is irrelevant.") (citing Title II of the ADA); *Updike v. Multnomah Cty.*, 870 F.3d 939, 955 (9th Cir. 2017) (noting the affirmative obligation of governmental entities to provide reasonable accommodations to people with disabilities).

IV. KENT TURNER MET THE *OLMSTEAD* CRITERIA.

In this case, Mr. Turner unquestionably met the criteria articulated under *Olmstead*.

A. Relevant Treatment Professionals Determined that Kent Turner's Reintegration into the Community Was Appropriate.

First, once Mr. Turner expressed his desire and intention to move back out into the community, treatment professionals[2] determined that Mr. Turner's reintegration into the community was appropriate. Corrected Brief of Respondent Washington State Department of Social & Health Services in No. 53369-3-II, Court of Appeals, Division II, of the State of Washington ("Resp. Brief,") at 6-8.[3] The nursing facility into which he had decided to move for a short time conducted a number of physical capability assessments. Resp. Brief, at 8. Therapists at the facility evaluated him and found him ready and capable of living in the community. Resp. Brief, at 8.

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[2] Although the Supreme Court in *Olmstead* references "the State's treatment professionals" (527 U.S. at 587), courts have uniformly recognized that the treatment professionals at issue need not be employees of the State. *See*, e.g., *Ga. Advocacy Office v. Georgia*, 447 F. Supp. 3d 1311, 1323 & n.6 (N.D. Ga. 2020) (citing cases and observing that: "Many courts, however, have found that *Olmstead* claims require no state professional's determination.")

[3] This brief adopts the factual account presented by the Washington State Department of Social & Health Services in the Court of Appeals below. Thus, this brief makes references to the factual record by respectfully directing this Court's attention to relevant sections of that previous briefing.

The physician for the facility set various goals for Mr. Turner, which he met. Resp. Brief, at 8.

Mr. Turner's providers assessed his ability to function within his new apartment residence in the community and found that he could manage it successfully. Resp. Brief, at 10. A registered nurse, a physical therapist, and an occupational therapist all viewed him as capable of living in his chosen environment. Resp. Brief, at 10. None of these providers gave any indication that such a living arrangement was unsuitable. Resp. Brief, at 10.

Two months after Mr. Turner moved back into the community, he met with his primary care physician and his neurologist. Resp. Brief, at 13-14. Neither of these physicians expressed any concerns about Mr. Turner's situation. Resp. Brief, at 13-14. On the contrary, the primary care physician specifically noted (1) the fact that Mr. Turner lived alone, (2) the level of care Mr. Turner was receiving in his apartment, (3) his well-nourished appearance and lack of any apparent distress, and (4) the lack of any apparent need for intervention by Adult Protective Services. Resp. Brief, at 13.

In short, Mr. Turner had (1) the desire to leave the nursing facility and to live in the community, (2) the competence to make rational determinations to effectuate his desire for independence in the community,

and (3) the imprimatur of the treatment professionals working with him that community integration was appropriate for him. Mr. Turner thus satisfied the first component of *Olmstead*.

B. Kent Turner Did Not Oppose Reintegration into the Community, But Rather Desired and Demanded That Reintegration.

Mr. Turner easily met the second component of *Olmstead*. He wanted very much to reside in the most integrated setting for him—the community. Resp. Brief, at 6-8. He always intended to reside in a nursing facility for only a very short time. Resp. Brief, at 5-6. Even when he formally resided in that facility, he often spent significant time out and about in the community. Resp. Brief, at 9. When the relevant treatment professionals deemed it appropriate for him to reintegrate into the community, Mr. Turner immediately took advantage of the opportunity to do so. Resp. Brief, at 6-12. It cannot reasonably be disputed that Mr. Turner met the second factor of *Olmstead*.

C. Kent Turner's Reintegration into the Community Could Be Reasonably Accommodated.

It is no more possible to dispute that Mr. Turner met the third *Olmstead* factor. The State of Washington and its agencies had the resources to assist Mr. Turner in his reintegration into the community and made those resources available for that purpose. Resp. Brief, at 6-12. Mr. Turner availed himself of at least some of the services that were made

available to him. *See* Resp. Brief, at 11-12. His decision to live in the community could be reasonably accommodated and was reasonably accommodated.

The fact that he did not choose to avail himself of every possible service made available to him does not alter the *Olmstead* analysis. *See*, e.g., *Olmstead*, 527 U.S. at 602 ("[P]ersons with disabilities must be provided the option of declining to accept a particular accommodation."); *Partelow v. Massachusetts*, 442 F. Supp. 2d 41, 49 n.13 (D. Mass. 2006) ("Department of Justice regulations … make it quite clear that a public entity is not empowered to require a person to accept any particular accommodations.") (citations and internal quotation marks omitted); *Blatch v. Hernandez*, 360 F. Supp. 2d 595, 634 (S.D.N.Y. 2005) ("The Disability Rights Statutes neither require nor authorize [the New York City Housing Authority] to impose measures on disabled individuals by way of seeking to accommodate their disabilities or to obviate adverse consequences of refusal or inability to recognize their disabilities. The reasonable accommodation process under the Disability Rights Statutes is a voluntary one, contemplating requests for accommodation and an interactive process of arriving at mutually acceptable accommodations or modifications. Thus, where accommodations not only are not requested but are actively resisted

by the disabled person, the obligation to accommodate arguably does not even arise.").

V. THE STATE OF WASHINGTON AND ITS AGENCIES HAD THE OBLIGATION TO COMPLY WITH FEDERAL LAW.

The State of Washington and its agencies could not have prevented Mr. Turner from making and pursuing his decision to reintegrate into the community. Had they attempted to do so, regardless of their motivation, they would have violated unambiguous federal law, as explained above. Indeed, federal courts have examined the level of commitment of the State of Washington and its agencies to the deinstitutionalization of people with disabilities before. In *ARC of Washington v. Braddock*, 427 F.3d 615, 621 (9th Cir. 2005), the United States Court of Appeals for the Ninth Circuit evaluated whether the State of Washington was required to increase its level of deinstitutionalization of people with disabilities residing in institutional settings. In holding that the State of Washington was not required to alter its existing programs in this manner, the Ninth Circuit found that "Washington has demonstrated it has a 'comprehensive, effectively working plan,' *Olmstead*, 527 U.S. at 605, and that its commitment to deinstitutionalization is 'genuine, comprehensive and reasonable,'…." *ARC of Washington*, 427 F.3d at 621. Whether or not the Ninth Circuit was correct in this finding, its holding means at a minimum that the State of

Washington cannot slacken its commitment to deinstitutionalization by forcing individuals to remain in institutional settings even when the *Olmstead* criteria are undoubtedly met, as they were here. *See also Townsend v. Quasim*, 328 F.3d 511, 520 (9th Cir. 2003) (holding that the State of Washington must provide community-based long term care for "medically needy" people with disabilities pursuant to the ADA unless it could "demonstrate that extending eligibility to these persons would fundamentally alter its Medicaid programs); *Dunakin v. Quigley*, 99 F. Supp. 3d 1297, 1319 (W.D. Wash. 2015) (holding that a plaintiff with a disability stated a claim under the ADA and Section 504 when he alleged that the State of Washington and its agencies failed to take steps necessary to permit him to leave an institution and reintegrate into the community).

This brief does not investigate state law issues in this matter. It is perhaps worth noting, however, that this Court in *Raven v. Dep't of Social and Health Services*, 306 P.3d 920, 928 (Wash. 2013), held that state law prevented involuntary institutionalization of any person without statutory involuntary commitment proceedings. In any event, however, pursuant to the Supremacy Clause of Article VI of the Constitution, federal law as interpreted by *Olmstead* would supersede applicable state law even if there were some conflict. Thus, the State of Washington and its agencies could

not inappropriately obstruct Mr. Turner's determination to reintegrate into the community in contravention of his federal rights.

VI. THE STATE OF WASHINGTON AND ITS AGENCIES HAD NO AUTHORITY TO POLICE KENT TURNER'S ACTIVITIES IN FURTHERANCE OF HIS OWN INDEPENDENCE ONCE HE REINTEGRATED INTO THE COMMUNITY.

As explained above, the State of Washington and its agencies could not have prevented Mr. Turner from reintegrating into the community without violating federal law. They would have violated federal law just as surely if they had attempted to police his activities in furtherance of his own independence once he accomplished that reintegration. As discussed above, public entities can offer accommodations to people with disabilities, but they may not force them to accept those accommodations if they do not choose to do so. Under those circumstances, the State of Washington and its agencies could not take an aggressive and intrusive role in policing Mr. Turner's activities and environment to ensure that he remained free from risk at all times. To adopt such an approach would have constituted intentional discrimination for purposes of the applicable disability rights statutes. Regardless of motivation, the State of Washington and its agencies would have then been engaged in the "uneven treatment of similarly situated individuals" (*Olmstead*, 527 U.S. at 598)—intruding into the manner in which an individual with a disability lives his own life in a way never

contemplated with respect to his peers without disabilities. While *Olmstead* recognized and prohibited a broader swath of discriminatory conduct than this traditional understanding of discrimination embraces, it certainly did not permit the more traditional and obvious form of discrimination. Congress itself noted these forms of discrimination and others in the preamble to the Americans with Disabilities Act, 42 U.S.C. § 12101. It prohibited public entities from engaging in such discrimination in 42 U.S.C. § 12132. Neither the State of Washington nor any of its agencies could have shrugged off these federal mandates and refused to allow Kent Turner to pursue his independence in his chosen manner.

VII. CONCLUSION

Kent Turner, a competent individual with a disability, exercised his federally protected right to live in the community as independently as he deemed possible. The State of Washington and its agencies could not have obstructed his ability to make and to act on that determination without violating his federal rights. With any increase in independence, whether for a person with or without a disability, comes an additional element of risk. Such an increase in risk is part of the very nature of independence for anyone. Tragically, Mr. Turner passed away in a terrible way. His tragic death, however, should not signal the need to diminish and degrade the dignity of his life and of the lives of others with disabilities by paving the

way for a culture of overprotective and intrusive activity on the part of public agencies bent on avoiding any potential liability. Congress has already recognized the long and troubled history of individuals with disabilities in combating such discrimination. Congress has already put in the necessary statutory mechanisms, binding on the State of Washington, its agencies, and any other relevant public entity, designed to ensure that Kent Turner had the right to pursue an independent life in the community. This Court should not undermine the foundations of those rights and protections now.

DATED: January 25, 2021.

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CERTIFICATE OF SERVICE

I certify, under penalty of perjury and in accordance with the laws of the State of Washington, that on January 25, 2021, I caused a copy of the foregoing document to be electronically served on all counsel of record as indicated below:

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Subject: 99243-6,Turner v. Wash. State DSHS, Motion for Leave to File Amici Brief
Importance: High

Dear Clerk,

Since the Appellate Portal appears to be offline, attached for filing in the above-referenced matter are:

1. Motion for Leave to File Amici Curiae Brief by National Council on Independent Living and ADvancing States, et al.; and
2. Appendix A - Brief of National Council on Independent Living and ADvancing States, et al., as Amici Curiae.

Respectfully submitted,

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